

An Assessment of Commercial Mediation Activities in Vietnam: Advantages and Challenges

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Abstract: Since Vietnam became a member of the World Trade Organization (WTO) on January 11, 2007, its economy has maintained impressive growth within the region and the world. Its average GDP growth rate from 2012 to 2022 was 6.02%. Despite the Covid-19 pandemic, its GDP grew by 8.02%¹ in 2022. The country's flourishing investment development, however, has posed significant challenges to the handling of the investment and commercial disputes. To alleviate the burden on the local court system, Vietnam has made efforts to explore alternative dispute resolution mechanisms in recent years. Commercial mediation has gained popularity within the business community.

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¹ PEOPLE'S ARMY NEWSPAPER, 2023.

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This article aims to provide an overview of the commercial mediation mechanism as an “out-of-court dispute resolution process, and to assess its future potential in Vietnam.

1 Perception of Commercial Mediation as a Means of Dispute Resolution in Vietnam and the Obstacles Faced by its Users

Vietnam has four common methods used in settling commercial disputes: negotiation, mediation, arbitration and court litigation. Negotiation, mediation and arbitration are collectively known as Alternative Dispute Resolution (ADR) or “out-of-court” resolutions. Mediation is classified into different regimes, including out-of-court mediation (also known as commercial mediation) and “court-annexed mediation”.

1.1 Out-of-Court/Commercial Mediation

The out-of-court commercial mediation regime in Vietnam is primarily regulated by Decree No. 22/2017/ND-CP issued by the Government on 24 February 2017 (“**Decree 22/2017/ND-CP**”). This Decree governs general the principles of mediation, mediation institutions, mediators, procedure for conducting mediation and the legal outcome resulting from such proceedings.

One of the main requirements for mediation is the presence of a mediation agreement between the disputing parties, in which they provide their consent to mediate based on the terms and conditions set forth in the agreement.

The parties involved in the commercial disputes have the option to mutually choose a mediator from a list of mediators provided by a registered mediation institution, or a list of individual mediators announced by the local department of justice in each province or city.

These disputants also have the right to select a specific set of rules from a commercial mediation organization that applies to their case. Alternatively, they may agree on their own procedures for the mediation process. In the event that the parties are unable to agree on a procedure, the appointed mediator will propose one. However, any proposed rules or procedures would still be subject to

the approval of the disputants, which reflects the fundamental principle of party autonomy and the essence of the commercial mediation.

The mediation process may be terminated at any time if the parties in the dispute reach a mutual agreement on a settlement outcome. Alternatively, the mediator may suggest terminating the mediation if it is no longer necessary, for instance, when the parties' positions make it unlikely that an amicable settlement can be achieved.

If a settlement agreement is reached during mediation, the parties will enter into a mediated settlement agreement that is binding on them as a civil agreement. Either party may then file a request with the court to recognize and enforce the settlement agreement as a record of successful mediation in accordance with the Civil Procedural Code 2015. The competent court's decision to recognize such mediated settlement agreement will be considered a court judgment and can be enforced in the same manner as a court judgment in accordance with the Law on Civil Judgement Enforcement 2014.

1.2 Court-Annexed Mediation

The Law on Court-Annex Mediation and Dialogue 2020 recently introduced a mediation regime that empowers the courts to conduct a mediation prior to the formal acceptance of a lawsuit. The aim is to allow the courts to explore the possibility of amicably resolving disputes through mediation, rather than resorting to formal court proceedings.

Procedurally, once a statement of claim has been validly submitted, a judge will be appointed to supervise the mediation process and inform the parties of their respective rights and interests. If the parties jointly agree on a specific mediator, the judge will appoint that mediator to proceed with the mediation. The appointed mediator can follow up by arranging joint or separate meetings with the disputants to understand their intentions and desires. Several of these meetings could be arranged until both parties are aware of the other's intentions and are able to determine whether a win-win solution can be agreed upon. However, any party may refuse to participate in the court-annexed mediation process. Conversely, it is open at any stage of the mediation for the parties to enter into a settlement of their commercial dispute, if they have the intention, goodwill, and voluntariness to amicably do so.

If the court-annexed mediation procedures end without any consensus to resolve the dispute, the court will prepare "minutes on failed mediation" and proceed to the next step of formal court proceedings. On the other hand, if the parties reach an agreement during the mediation, the court will prepare "minutes on successful mediation" with the parties as witnesses. This will be followed by

a court decision recognizing the successful mediation. Such a decision will be binding on the parties and enforceable in the same manner as a judgment.

This article focuses on the assessment of out-of-court commercial mediation, which has been regulated and more actively implemented in recent years in Vietnam. Top of Form.

1.3 The Limited Use of Commercial (“Out of Court”) Mediation in Vietnam

Despite the availability of a legal framework and mediation services in Vietnam, the use of commercial mediation remains uncommon in practice. As of 2020, there were less than 30 reported cases of commercial mediation, out of which only 11 cases were successful.

According to the annual report in 2021 by the Vietnam International Arbitration Centre (VIAC) and its Vietnam Mediation Center (VMC), the VMC handled only 24 disputes through mediation in the period from 2018 to 2021, with 10 cases settled in 2021, compared to 270 arbitration cases handled by VIAC. Another reputable mediation center in Vietnam, the Vietnam International Commercial Mediation Center (VICMC), recorded that only about 15 mediation cases had been handled by the organization to date.

In comparison to court-annexed mediation, Vietnamese courts have received a total of 541,962 petitions and requests in the period from 1 January 2021 to 1 July 2022, with 114,332 cases conducted via mediation procedures, equivalent to 21%. The mediation success rate was about 37.2% in 2021 and 62.8% for the first half of 2022. However, 70% of those successful mediations related to marriage and family disputes, such as divorces and requests for dividing joint assets and the custody of children, rather than commercial disputes.

1.4 Obstacles to Parties Adopting Commercial Mediation as a Means to Resolve Their Commercial Disputes in Vietnam

There are several possible reasons for the limited popularity of commercial mediation in Vietnam.

First, whenever there is a deadlock in negotiation, it appears to be a current “habit” for parties to resort to litigation or arbitration to resolve their dispute. Although during the arbitration and court proceedings, mediation is also encouraged, it is difficult to make parties agree to mediate because both parties often believe that justice is in their favor, and compromise is unnecessary.

Secondly, commercial mediation is still a new dispute resolution mechanism in Vietnam even if the general concept of mediation has been introduced in the Vietnamese legislation system for some time. Decree 22/2017/ND-CP (issued by the Government in 2017) is considered as the first legal document which comprehensively governs out-of-court commercial mediations and provides a clear legal regime for the establishment and operation of commercial mediation centers in Vietnam. Given the short time of Decree 22/2017/ND-CP's implementation, there are still several challenging issues to commercial mediation. For example, the number of commercial mediation centers established in Vietnam and the number of qualified mediators who have been professionally trained and equipped with the relevant skills are still limited. Additionally, the business community may not yet fully understand the advantages of commercial mediation and may view it as an unnecessary procedure which just incurs additional time and money for the parties.

Thirdly, current Vietnamese legislation is not fully conducive to the use of mediation in Vietnam. In particular, the Vietnamese law does not specifically provide for the mediation period to be excluded from the computation of the limitation period. In this regard, the limitation period under the law to initiate a commercial lawsuit is only 2 years from the moment the legitimate rights and interests are infringed upon. As a result, parties may be rushed into lodging a petition to commence legal proceedings in order to meet the deadline. On the other hand, in some other jurisdictions, the time dedicated to mediation is excluded from the limitation period, which better encourages the parties to consider mediation as the first choice to resolve their dispute.

Last but not least, the fact that Vietnam has not yet become a member of the 2018 United Nations Convention on International Settlement Agreements Resulting From Mediation ("**Singapore Convention on Mediation**"). Accordingly, the mediated settlement agreements conducted overseas by foreign mediation organizations may face a challenge in being recognized and accepted for enforcement in Vietnam. Vietnamese courts highly unlikely recognize and accept such mediated settlement agreements conducted overseas by foreign mediation organizations for enforcement in Vietnam. On the other hand, the mediated settlement agreements conducted in Vietnam may face a challenge in being recognized and accepted for enforcement in other countries subject to the laws of such countries. These may potentially cause the foreign investors and foreign enterprises to hesitate when considering settling their disputes involving its business and investment activities in Vietnam through mediation.

2 The Prevalence of International Mediation in Vietnam

Vietnamese legislation currently provides a mechanism for the Vietnamese courts to recognize and enforce settlement agreements arising from mediation conducted by mediators and domestic mediation organizations which are established and registered under Decree 22/2017/ND-CP.

Foreign commercial mediation institutions are permitted to establish a commercial presence in Vietnam, such as a representative office to conduct liaison and promotional activities or a branch to carry out commercial mediation activities in Vietnam in accordance with Decree 22/2017/ND-CP. Foreign commercial mediation institutions are required to take responsibility for a branch's compliance with Vietnamese law in its operations. They are also required to appoint a commercial mediator to be the head of the branch and to act as its authorized representative. A foreign commercial mediation institution that has been licensed to establish and operate a branch in Vietnam may directly conduct mediation activities in Vietnam, and any settlement agreement arising from mediations that they conduct would be recognized by the Vietnamese courts for enforcement.

However, there are currently no specific provisions under Vietnamese law on the recognition of settlement agreements arising from mediations conducted by parties at foreign mediation organizations. Therefore, the recognition and enforcement of such settlement agreements still remain to be addressed by the Vietnamese courts. There has been no published case of a settlement agreement arising from a mediation conducted by a foreign mediation organization being recognized and accepted for enforcement by the Vietnamese court.

With that being said, the fact that Vietnamese legislation has made it possible for the establishment and operation of commercial presences of foreign commercial mediation institutions in Vietnam, is a significant step forward. However, pending Vietnam's accession to and ratification of the Singapore Convention on Mediation, the recognition and enforcement of the settlement agreements arising from mediations conducted via international mediation overseas, still remain unresolved. Overall, given the current legal framework on commercial mediation in Vietnam, the use of mediation for the settlement of international commercial disputes in Vietnam is still not popular.

3 Foreseeable Developments in Commercial Mediation within Vietnam in the Near Future

Mediation practice in Vietnam is still in its early stages of development. Nonetheless, there are some reasons for an optimistic view on the development of commercial mediation practice in Vietnam.

3.1 Commercial Mediation Activities Are Encouraged in Vietnam

The Civil Procedural Code 2015 has given emphasis to mediation by devoting a chapter (Chapter XXXIII) on the procedure for the recognition of the results of mediation and other out-of-court methods of dispute resolution. The use of commercial mediation to resolve disputes is also encouraged under the Party's guidelines and the State's legal policies. Resolution No. 49-NQ/TW dated 02 June 2005 issued by the Politburo on the "*Judicial Reform Strategy to 2020*" sets out the task of "encouraging the settlement of certain disputes through negotiation, mediation and arbitration".

With the issuance of Decree 22/2017/ND-CP, the principles of mediation, the order of mediation procedures, the standards of mediators, the establishment, registration and operation of commercial mediation organizations have also become clearer and more specific. Moreover, there are promising indications that Vietnam may upgrade and promulgate a separate law (which is higher than Decree level) to regulate this dispute settlement regime.

The Vietnamese authorities have expressed an ambition and made efforts to promote and encourage commercial mediation so as to improve the judicial system in general. The aim is to reduce the workload of the court system, expediting the settlement of disputes for the purpose of enhancing the development of the economy and society.

3.2 Increased number of commercial mediation centers and mediators in Vietnam

According to a preliminary survey conducted by the Ministry of Justice of Vietnam (MOJ), as at the end of 2021, there were 15 mediation centers established and 7 arbitration centers having authority to conduct mediations in Vietnam. There are also more than 100 qualified commercial mediators.

VMC and VICMC are regarded as the most reputable and leading commercial mediation centers in Vietnam. They were established since the effective date of Decree 22/2017/ND-CP. In practice, these organizations have handled most of the commercial cases in Vietnam so far. Most mediation centers operate with the view of providing social support and assistance to businesses through mediation at a competitive cost. Mediation centers have proactively conducted various activities to enhance public awareness of the benefits of commercial mediation.

3.3 Mediation Training Activities in Vietnam

Currently, the law of Vietnam does not mandate professional training for commercial mediators. There is also no mediator training included in the compulsory educational modules offered in Vietnamese universities or the Judicial Academy. This is currently being reviewed so as to meet the anticipated upcoming demand for mediators. Mandatory training and examination could improve the professionalism and skills of mediators and establish the role of a commercial mediator as a recognized profession. The leading commercial mediation centers in Vietnam such as VMC or VICMC have regularly offered training courses on professional mediation skills for trainees from various background.

In local provinces, professional training has focused on improving the quality of mediation activities at the grassroots level. These activities are performed by mediators licensed by the local Judicial Department. Mediation experts from key centers have been invited to share their knowledge and expertise with local mediators.

3.4 Promotion and Development Activities Regarding Commercial Mediation

Nowadays, the leading mediation centers such as VMC and VICMC are quite active in conducting promotional and development activities. For example, in the year 2022, there were 2 big tournaments on mediation skills held by these organizations. V-Med competition (Vietnam Mediation Moot) was held by VICMC in August 2022 as the first Vietnamese commercial mediation tournament in Vietnam for candidates from leading universities in the country.² Concurrently, the ICMC 2022 competition (VMC-HLU International Commercial Mediation Competition) was held by VMC is the first English commercial mediation tournament with a great number of candidates from universities nationwide. In addition, numerous workshops and seminars were held by these leading mediation centers which help to promote the awareness of commercial mediation practice and generate vibrant discussion among the key players in the market to further develop this dispute settlement mechanism.³

VMC and VICMC also aim to set up cooperations and partnerships with other organizations including law firms. Several commercial mediators are lawyers and specialists from different organizations. Such cooperations and partnerships have

² Available at: <https://vicmc.vn/v-med-2022-vietnam-mediation-moot/>.

³ Available at: <https://www.vmc.org.vn/tin-tuc-su-kien/to-chuc-thanh-cong-cuoc-thi-hoa-giai-thuong-mai-quoc-te-vmchlu-icmc-2022-n910.html>.

brought significant efficiency and benefits to the development of mediation practice in Vietnam.

4 The Level of Receptivity to the Singapore Convention on Mediation and the Possible Hurdles to Vietnam's Accession to and Ratification of the Convention

Under the Law on International Treaties (No. 108/2016/QH13 dated 09 April 2016, the National Assembly of Vietnam), in general, the ministerial-level State agencies are entitled to propose to the Government on the needs of accession to a specific international treaty. The proposing State agency would be obligated to organize different procedures such as checking and examination of Vietnam's current related regulations and international treaties; conducting research on the effect of such international treaty on Vietnam's national defense, public security, politics and social fabric; seeking opinions and comments from other related State agencies (i.e., the Ministry of Foreign Affairs, Ministry of Justice, etc.). The final decision on accession to such international treaty would require the ratification by the Vietnam's National Assembly or the President for each specific case.

4.1 The Possible Hurdles to Vietnam's Accession to and Ratification of the Singapore Convention on Mediation

Important international documents governing commercial mediation include the Singapore Convention on Mediation and the UNCITRAL model law on mediation. The Singapore Convention on Mediation is considered as an effective tool to resolve international trade disputes, creating favorable conditions for international trade to develop harmoniously, thereby contributing to the implementation of the sustainable development goals. However, to this date, Vietnam is still not a member of the Convention. Vietnam's accession to and ratification of this Convention may face the following hurdles and obstacles.

First, the Singapore Convention on Mediation is also quite new and its implementation by its member states have so far been quite limited, which leads to a limited source of experience for non-member state like Vietnam to evaluate when considering accession and ratification. This makes it more challenging for the Vietnamese authorities to analyze and evaluate the Convention's effect on issues of national defense, public security, economy and society in a prudent manner.

Secondly, there are still certain discrepancies between Vietnamese law and the provisions of the Singapore Convention on Mediation. For example, under the current legislation, the Vietnamese courts may only recognize dispute settlement

agreements assisted and held by mediators and mediation organizations registered to operate under the provisions of Decree 22/2017/ND-CP. As there are no specific provisions on the recognition of settlement agreements arising from mediations conducted by overseas mediation organizations which are not registered a presence to operate in Vietnam, Vietnamese courts are likely to refuse the recognition and enforcement of such settlement agreements. Therefore, it is necessary for Vietnam to carefully study and consider any amendments or supplementation to its current laws to align it with the requirements of the Singapore Convention on Mediation. For instance, Vietnam may need to enact a separate law on commercial mediation in order to specifically provide for the recognition and enforcement of settlement agreements arising from mediation conducted by overseas qualified/licensed mediation centers or individual mediators.

Thirdly, Vietnam's court system has a limited workforce as well as limited experience in handling commercial cases with foreign elements. Therefore, if Vietnam was to develop a mechanism to recognize and enforce settlement agreements related to international mediation, it might be a significant challenge for Vietnam's court system and judges.

Fourthly, although the number of commercial mediation centers and mediators in Vietnam is considerable, the number of experienced ones is still rather limited. This is because the number of mediation cases has been quite limited. Consequently, many commercial mediators have not had the chance to practice and sharpen their skills. As a result, Vietnam's mediation centers may not be able to compete side-by-side with international mediation centers if Vietnam accedes to the Singapore Convention on Mediation.

4.2 Progress and Level of Receptivity to the Singapore Convention on Mediation

Despite the perceived obstacles highlighted above, having recognized the potential and advantages of commercial mediation, Vietnam has initiated several actions to kickstart the research and evaluation of the possibility of joining the Singapore Convention on Mediation.

During 2020, in the review of 15 years implementing Resolution 48-NQ/TW and Resolution 49-NQ/TW regarding the development of Vietnamese judicial system, the Vietnamese Politburo set out the goal to further improve the alternative dispute mechanism. Consequently, the Prime Minister decided in the Decision 1268/QĐ-TTg dated 02 October 2019 to ratify the action plan on improving the mediation and arbitration mechanism and proactively assigned the Ministry

of Justice to review and evaluate the possibility of Vietnam's accession to and ratification of the Singapore Convention on Mediation.

5 Conclusion

Commercial mediation offers numerous advantages, including cost and time efficiencies, flexibility of process and confidentiality. It can also produce win-win solutions that satisfy the parties' interest, while preserving their relationship and reputation. Despite recent efforts to promote the use of mediation in Vietnam, more needs to be done to enhance its adoption as a means of dispute resolution.

Vietnam's legal frameworks and policies should be more supportive and aligned with international standards. Commercial mediation centers and mediators should provide better training, promotional activities, and service quality standards to assist parties in settling their commercial disputes more effectively. The business community should also be more receptive to mediation as a means of alternative dispute resolution. If these challenges are addressed, commercial mediation can become the preferred choice for both domestic and foreign investors in Vietnam for settling their commercial or investment disputes.

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